



KENTUCKY
Council
on postsecondary education

**Desegregation in the South
and The Kentucky Plan
for Equal Opportunities
1978-2005**



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Desegregation in the South And The Kentucky Plan for Equal Opportunities

Section I. The Adams Case in Southern and Border States 1969 to Present

Title VI and HEW Administrative Actions: Title VI of the Civil Rights Act of 1964 provides that:

“No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”

There are 19 states that at one time operated dual systems of public higher education. Each state was to take “affirmative steps” to rid itself of the remnants of its segregated past.

In 1969 the U. S. Department for Health, Education and Welfare (now the U. S. Department of Education) informed 10 states, now referred to as the 1st tier Adams states, that they continued to operate dual segregated systems of public education. The states were Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia. The states were given 60 days to file desegregation plans that HEW had to either accept or reject within 120 days thereafter.

No immediate action was taken by HEW to enforce Title VI in any of the states between 1970 and 1972. Private legal action commenced against HEW to force the withholding of federal funds from institutions found not to be in compliance with Title VI. The court case was *Kenneth Adams v. Elliot L. Richardson* and the states that were part of the federal action were known as Adams states.

Almost 10 years after the initial action, in 1978, HEW notified eight additional “southern and border” states, referred to as the 2nd tier Adams states, that they were operating systems with remnants of dual systems of public education. These states were Alabama, Delaware, Kentucky, Missouri, South Carolina, Tennessee, Texas, and West Virginia. One border state, Ohio, is included as one of the 19 Adams states because of a special complaint, filed with the U. S. Department of Education regarding its treatment of Central State University. During the early to mid 1990’s, Ohio attempted to close Central State University, a public, historically black university.

The HEW review took different forms among the 19 states. In some cases, states resisted HEW action. Mississippi and Louisiana were referred to the Department of Justice for legal action. Private legal action commenced in Alabama and Tennessee. Also, in January 1975, private legal action commenced in Mississippi. North Carolina filed suit against HEW. Most states filed voluntary plans that were subsequently accepted by HEW.

Current Status of Desegregation Actions in the Adams States: Of the 19 states, eight states have been found in compliance, six are under review or have partnerships, four are not in compliance, and one, Ohio, has agreed to voluntary monitoring even though the Title VI investigation has been closed.

Federal courts have determined that Mississippi, Alabama, Louisiana, and Tennessee are not in compliance with Title VI -- their court imposed desegregation plans continue in effect. Louisiana has completed all terms of a negotiated settlement except provisions related to the land grant institution. In 1996, Tennessee asked the courts to release them from monitoring—in 1997 the court rejected the Tennessee argument. In 1992 the Supreme Court of the United States, vacated a decision of the Court of Appeals “that Mississippi had brought itself into compliance with the Equal Protection Clause” and remanded the case back to the District Court. Mississippi is currently implementing the actions approved by the court.

Although the Office for Civil Rights found Georgia in compliance, a recent suit challenges the Georgia system’s compliance by arguing that Georgia is discriminating against white students. The lawsuit has not been adjudicated at this point.

In a letter dated January 15, 1981, William H. Thomas, Regional Civil Rights Director, Region IV, U. S. Department of Education informed John Y. Brown, Jr., Governor, Commonwealth of Kentucky that:

“Based on the evidence we have examined, it is our finding that the Commonwealth of Kentucky, in violation of Title VI of the Civil Rights Act of 1964, has failed to eliminate the vestiges of its former *de jure* racially dual system of public higher education. ... Accordingly, we request that you submit a statewide desegregation plan that will fully desegregate the Kentucky system of higher education. ...”

Kentucky submitted its first plan in 1982, which was accepted by the U. S. Department of Education in June 1983. In 1987, Kentucky was relieved from further reporting, but Kentucky remains under review. In 2000 the U. S. Department of Education, Office for Civil Rights entered into a partnership with the Commonwealth of Kentucky to complete any outstanding commitments under Title VI of the Civil Rights Act of 1964. The partnership expired December 31, 2002. Because a number of commitments were not met, the partnership remains in force.

Other states besides Kentucky that continue under review or have partnerships with the U. S. Department of Education are Florida, Maryland, Pennsylvania, Texas, and Virginia.

**Council on Postsecondary Education
Adams States**

| 1st Tier State | Initial HEW Action | Enforcement Action | Current Status |
|-----------------------|-------------------------------|-------------------------------|-----------------------|
| Arkansas | January-69 | Voluntary Plan | Compliance/1988 |
| Florida | February-70 | Voluntary Plan | Under Review |
| Georgia | February-70 | Voluntary Plan | Compliance/1988 |
| Louisiana | January-69 | DOJ--Suit Filed--1974 | Not in Compliance |
| Maryland | March-69 | Voluntary Plan | Under Review |
| Mississippi | March-69 | DOJ--Suit Filed--1974 | Not in Compliance |
| North Carolina | February-70 | NC--Suit Filed--1978 | Compliance/1988 |
| Oklahoma | February-70 | Voluntary Plan | Compliance/1989 |
| Pennsylvania | March-69 | Voluntary Plan | Under Review |
| Virginia | December-69 | Voluntary Plan | Under Review |

| 2nd Tier State | Initial HEW Action | Enforcement Action | Current Status |
|-----------------------|-------------------------------|-------------------------------|-----------------------|
| Alabama | 1978 | DOJ --Suit Filed--1976 | Not in Compliance |
| Delaware | 1978 | Voluntary Plan | Compliance/1980's |
| Kentucky | 1979 | Voluntary Plan | Under Review |
| Missouri | | Voluntary Plan | Compliance/1989 |
| South Carolina | | Voluntary Plan | Compliance/1987 |
| Tennessee | 1968 | DOJ --Suit Filed--1968 | Not in Compliance |
| Texas | 1981 | Voluntary Plan | Under Review |
| West Virginia | | Voluntary Plan | Compliance/1988 |

| Special Complaint | Initial HEW Action | Enforcement Action | Current Status |
|------------------------------|-------------------------------|-------------------------------|-----------------------|
| Ohio | | Ohio, OCR Negotiations | Monitoring |

Section II. Basis For The 1997-2002 Kentucky Plan for Equal Opportunities

In 1982, the Council on Higher Education developed *The Commonwealth of Kentucky Higher Education Desegregation Plan* in response to a U.S. Office of Education Office for Civil Rights (OCR) finding that "the Commonwealth of Kentucky, in violation of Title VI of the Civil Rights Act of 1964, has failed to eliminate the vestiges of its former de jure racially dual system of public higher education." Development of the plan was necessary for Kentucky to meet the requirements of Title VI of the Civil Rights Act of 1964. The duration of the original plan was five years (1982-87). In 1987, the Commonwealth submitted a summary report to OCR on all actions taken by Kentucky under the plan. OCR released Kentucky from further data reporting in 1987 but, to date, OCR has not notified Kentucky as to its status regarding Kentucky's satisfaction of the 1981 findings.

OCR cited Kentucky in three areas: students, employment, and enhancement of Kentucky State University, the state's historically black university. The state's objective to enroll Kentucky resident African American students in college in the same proportion as that for white students has been achieved. While the new plan recognizes this achievement, individual institutions will be expected to improve their enrollment. Conversely, the state has not made as much progress in the two remaining areas of employment and enhancement of Kentucky State University. The new plan recognizes the need to place additional emphasis on student retention, graduation, employment and enhancement of Kentucky State University.

Subsequent to the 1987 CHE report filed with OCR, CHE determined that additional work needed to be done in order to extend equal opportunity for access to and success in higher education. A second plan was necessary because the institutions had not achieved the original plan goals related to employment, retention, and graduation. The second plan is titled *The Kentucky Plan for Equal Opportunities in Higher Education (The Kentucky Plan)*. The original duration of *The Kentucky Plan* was 1990-95. Annual evaluations of the progress made under *The Kentucky Plan* indicated that more action was needed in several areas -- retention, baccalaureate degrees awarded, graduate enrollment and degrees awarded, and employment. The objectives of *The Kentucky Plan* were the same as those adopted in the 1982 Desegregation Plan -- student recruitment, retention, graduation, employment of African Americans as faculty, administrators, and professionals, and enhancement of Kentucky's historically black institution.

In November 1995, CHE extended *The Kentucky Plan* for one year to allow time to develop a new plan. This plan has as its foundation the vision statement previously expressed. It is committed to extension of equal opportunity, both for access to and success in higher education, to all people without consideration of race. Further, this new plan commits institutions to develop and implement programs and activities designed to result in successful achievement of institutional and system objectives.

The Kentucky Plan 1997-2002 was developed in the context of a changing legal environment in which activities that have been used to promote affirmative action and equal opportunity, particularly minority preferences in admissions, financial aid, and employment, have come under increasing court scrutiny. It is important to note that the fundamental principles and purpose of equal opportunity and affirmative action have not been challenged as much as specific practices

used to accomplish the ends of equal opportunity and affirmative action. Governmental plans that require the use of minority preferences as key elements in meeting goals are subject to review under a standard of strict scrutiny. This means that such plans must satisfy a compelling government interest, and that the means used to accomplish the goals set out in the plan must be narrowly tailored to satisfy those ends.

CHE, CEO, and the institutions are cognizant of the changing legal environment. Development of the new plan acknowledges the guidance of OCR and the decisions of federal courts. Unfortunately, the guidance from these sources often has been confusing and sometimes conflicting. The new plan places significant reliance on the questions and answers regarding race-targeted financial aid published by OCR in the Federal Register, February 23, 1994, and on the following federal court cases:

U.S. Supreme Court:

- Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978)
- U.S. v. Fordice, 505 U.S. 717, 112 S. Ct. 2727, (1992)
- Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995)
- City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989)
- Wygant v. Jackson Bd. of Education, 476 U.S. 267, 106 S. Ct. 1842 (1986)
- U.S. v. Paradise, 480 U.S. 149, 107 S. Ct. 1053 (1987)

Circuit Courts of Appeal:

- Podberesky v. Kirwan, 38 F. 3d 147 (4th Cir., 1994), (cert. denied, 1995)
- Hopwood v. Texas, 78 F. 3d 932 (5th Cir., 1996)

The recent Sixth Circuit Court of Appeals case, *Middleton v. City of Flint*, 92 F.3d 396, (6th Cir., 1996) will be closely monitored by CEO and the institutions to assess the impact on programs and activities involving minority preferences. The full import of the case is not yet known. CHE also will work with officials at OCR on changes, if any, in federal guidelines. OCR informally has indicated its intention to visit all Adams states.

The principal case relied upon in the development of *The Kentucky Plan 1997-2002* is *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978). The Supreme Court, while ruling the University of California's minority admission program unconstitutional, stated that race may be one factor in student admissions. There also was indication from a plurality of the court that the promotion of diversity is a legitimate government interest sufficient to justify limited minority preference programs.

The Kentucky Plan 1997-2002 is a voluntary plan focused on providing equal opportunity of access to and success in higher education. The plan sets objectives for institutions in categories of student enrollment, student retention and student graduation; it also incorporates institutionally developed objectives for employment of faculty and staff. Each of the eight public institutions participated in the development of the objectives and timetables. (Note: the University of Kentucky represented the community college system administered by them.) Objectives are flexible, as are timetables, and a waiver program exists. This means that admission of a Kentucky resident African American does not drastically impact the rights of any

other Kentucky resident who may be similarly qualified and that the impact on employment opportunities for non-minorities is minimal. Institutions are free to adopt a variety of programs and activities individually tailored to specific institutional need.

Within Kentucky, the legal environment is influenced by SB 398, codified as KRS 164.020 (9). This statute, approved in 1992, requires that CHE not approve new academic programs at institutions, which fail to meet equal opportunity objectives. The statute, however, also requires that the administrative regulation implementing the statute contain a waiver provision. 13 KAR 2:060, in keeping with the flexible nature of the expiring plan contains two waiver provisions -- a qualitative and a quantitative waiver. The latter waiver is available to institutions who meet a required number of objectives during a particular year. The qualitative waiver requires action by CHE upon a showing by the institution that plans are in place to help the institution realize equal opportunity objectives. Another administrative regulation will be promulgated providing waiver provisions upon adoption of the new plan.

The Kentucky Plan 1997-2002 contemplates continued monitoring of the legal environment. Should OCR or court rulings require modification of the plan, CHE and CEO will be ready to address needed changes. Institutions also are expected to monitor court rulings and adjust specific activities to conform with OCR directives and federal and state court rulings.

Currently, institutions have achieved parity in college admission of Kentucky resident African Americans and white students but have failed to achieve parity for retention and for the award of baccalaureate degrees. A number of alternatives (scholarships, financial aid, mentoring programs, etc.) are available to help institutions achieve the retention and degree objectives over time. Additionally, CHE has begun working closely with the Kentucky Department of Education (KDE) to identify potential college students and to identify academic deficiencies of incoming Kentucky resident college students. Through this dialog with KDE, higher education seeks to find ways to graduate students who are better prepared to complete college level work.

The Kentucky Plan 1997-2002 was developed through a collaborative process involving CHE, CEO and the institutions. Citizens were invited to provide input during development of the new plan through public forums. The process also included input from external groups or persons interested in equal opportunities in higher education. University presidents appointed representatives to serve on the work group responsible for developing the revised plan, which was shared with the presidents for comment.

Section III. Federal Court Cases that Impact Affirmative Action and Diversity

What follows are brief summaries of the facts surrounding each of the recent cases and the holdings of the courts. The summary starts with the 1978 Bakke decision and ends with Gratz v. Bollinger and Grutter v. Bollinger (the Michigan Cases). The summary gives a brief overview of the case but does not address the factual situation or legal rulings in a comprehensive manner.

Regents of University of California v. Bakke, 438 U.S. 265 (1978)

Allan Bakke, a white male, was denied admission to the Medical School of the University of California at Davis, a state institution in the University of California system. Bakke brought suit in federal court alleging that the state of California through the University of California at Davis discriminated against him impermissibly. The charge alleged violations of Title VI of the Civil Rights Act and of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

U.C. at Davis maintained a dual admissions system. White applicants applied through the general admissions procedures while a special minority admission program was available for members of minority groups and for economically and/or educationally disadvantaged individuals. Sixteen of the one hundred positions were reserved for individuals through the special minority admission program.

The California Supreme Court struck down the admission program and ordered U.C. at Davis to admit Bakke. The U.S. Supreme Court affirmed the decision of the California Court in part and reversed and remanded in part.

The Supreme Court could not agree on the rationale for its holding. Six justices filed opinions, none of which received more than four votes. Justice Powell's opinion is the one most quoted. Powell's opinion says, "The attainment of a diverse student body clearly is a constitutionally permissible goal for an institution of higher education." He also stated that a consideration of ethnicity is "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." No other justice joined in the part of Powell's opinion on diversity. Powell's opinion stated that the correct standard for review of racial classifications is strict scrutiny.

U.S. v. Fordice, 112 S. Ct. 2727 (1992)

Implementation of the decision in the U.S. v. Fordice case or Ayers as it is sometimes known, is still under way. The Supreme Court issued a ruling in 1992 basically stating that Mississippi had not fully dismantled its prior segregated system of higher education. The Supreme Court holding contained the following relevant points:

Where a state maintained a dual university system for blacks and whites, the state has an affirmative duty to dismantle the system. The state does not discharge its obligation until it eradicates policies and practices traceable to the prior de jure dual system.

- The court must consider whether the existing racial identifiability of universities is attributable to the state.
- Adoption of race neutral policies is not sufficient to fulfill affirmative obligation.
- The court must consider whether state policies and procedures continue to have segregative effects, either by influencing student enrollment decisions or by fostering segregation in facets of the university system. Do the policies lack sound educational justification? Can the policies be practicably eliminated?

- The requirement of different admission standards for traditionally black institutions and for traditionally white institutions discriminates against black students and narrows choices in admission.
- The Supreme Court seemed particularly concerned with the disparate admission standards in relation to the past de jure discrimination within the Mississippi system. The court asked the question why should dual and disparate admissions standards apply? In the opinion of the court, there was not a satisfactory answer.

Podberesky v. Kirwan (Maryland), 38 F. 3d 147, (4th Circuit, 1994)

Podberesky is a minority (non African-American) who met all of the qualifications for a University of Maryland scholarship program except that he was not African-American. He was denied a scholarship.

The District Court ruled in favor of the University of Maryland. The Circuit Court overturned that ruling and the U.S. Supreme Court refused to review the Circuit Court's ruling.

The following aspects of the Fourth Circuit Court of Appeals ruling is significant:

- The test for any remedial action based on racial classification is strict scrutiny. The proponent of a measure must demonstrate that the remedial action is necessary and is narrowly tailored.
- There must be a demonstration that there are present effects of past discrimination and that there is a connection between those present effects and the remedial action employed.
- The courts will look to other non-racial methods to implement remedial action first.
- The mere knowledge of past discrimination is not sufficient to prove present effects.
- Poor reputation in the community is not sufficient to show present effects.
- Hostility of the African-American community toward the University of Maryland was not a sufficient showing of present effects.
- General societal discrimination is not sufficient to show present effects.
- Under-representation of African-American students in the student body must be proven. The representative pool for comparison purposes must be drawn carefully to remedy the past discrimination. *Note: the University of Maryland included non-resident minority students.*

The University of Maryland scholarship program lowered the effective minimum criteria needed to determine the applicant pool and ignored the intergenerational effects of societal discrimination, University of Maryland failed to consider possible race-neutral alternatives, and role model theory and mentoring is not an acceptable basis for race conscious program.

The Podberesky case is limited in its applicability to the Fourth Circuit, however, the Supreme Court in refusing certiorari may be indicating that it agrees with the Fourth Circuit holding and rationale.

Adarand v. Peña, 115 S. Ct. 718 (1995)

The Adarand case arises out of a federal Department of Transportation requirement that contractors should have a financial incentive to hire subcontractors certified as small businesses controlled by economically disadvantaged individuals. The general term is a minority preference

program. Adarand Constructors, Inc., a non-minority business, was low bid on a Colorado contract but failed to receive the contract because of the minority preference program.

The case is significant because the U.S. Supreme Court firmly established that the standard of review for all racial classifications is strict scrutiny. The opinion is consistent with *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The court stated in the Adarand decision that all programs or activities which use racial classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest.

Hopwood v. Texas 78 F. 3d 933 (5th Circuit, 1996)

A non-minority student was denied admission to the University of Texas law school based upon an affirmative action program, which gave substantial racial preferences to African-American and Mexican-American applicants. The school maintained a separate review system for minorities. The presumptive admission category was different for minorities than for non-minorities. The school established goals for minority enrollment.

The Fifth Circuit Court of Appeals held that the admissions program was discriminatory under the Fourteenth Amendment to the U.S. Constitution. Among the statements made by the court are the following:

- The central purpose of the equal protection clause is to prevent states from purposefully discriminating between individuals on the basis of race; it seeks ultimately to render the issue of race irrelevant in government decision-making.
- Preferring members of one group for no reason other than race or ethnic origin is discrimination for its own sake forbidden by the equal protection clause.
- Any consideration of race or ethnicity for the purpose of achieving a diverse student body was not a compelling interest.
- State must show present effects of past discrimination.
- The law school's broad affirmative action program for admissions that swept in all minorities with a remedy that was not related to past harms was violative of the equal protection clause.
- Law school's bad reputation as under-representing minorities and being hostile to minorities are not sufficient to justify the use of race in admissions.
- The correction of past discrimination must be narrowly focused. The state of Texas erred in looking at the system of higher education. It should have focused on the school of law within the University of Texas.
- The only compelling state interest is in the remediation of past discrimination. "[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."

The court tracks the history of Supreme Court rulings and quotes Croson as saying "unless racial classifications are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

"Accordingly, we see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional."

"A university may properly favor one applicant over another because of his ability to play the cello, make a down field tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background."

There must be a finding of past discrimination.

"A bad reputation within the minority community is alleviated not by the consideration of race in admissions, but by school action designed directly to enhance its reputation in that community."

"Past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions."

The Fifth Circuit Court of Appeals went further than other courts in indicating that societal discrimination may not be the basis for remedial action. The court also indicates that diversity does not constitute a "compelling state interest" sufficient to justify remedies that are racially based.

Gratz v. Bollinger 539 U.S. 244, 123 S. Ct. 2411, 2003

University of Michigan: Undergraduate Admissions Policy

The Gratz case is a companion case to Grutter v. Bollinger, 539 U.S. 982, 123 S. Ct. 2325 (2003). The Gratz case involved the undergraduate admissions policies at the University of Michigan while Grutter concerned the law school admissions practices. A summary of the finding of the U.S. Supreme Court in Gratz is:

Equal protection rights of Caucasian applicants to University of Michigan's undergraduate College of Literature, Science and the Arts (LSA) were violated by University's policy of automatically distributing 20 points, or one-fifth of those needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race; that policy was not narrowly tailored to asserted compelling state interest in achieving educational diversity.

The University of Michigan admissions policy used a scoring system to determine eligibility for admissions. The policy awarded 20 points to the score for each underrepresented minority applicant. The 20 point score represented 20 percent of the total potential score, and, as such, was sufficient to ensure that virtually all minorities were admitted while other, more highly qualified non-minority candidates were not admitted. Two issues were before the Supreme Court: whether the university's avowed interest in creating a diverse student body represented a compelling state interest; and, if yes, whether the approach used by the University of Michigan was narrowly tailored so that it would pass the strict scrutiny test that racial classifications must undergo.

The court specifically ruled that racial diversity is a legitimate state purpose and that a plan, narrowly tailored, can include racial preferences and still pass constitutional muster. However, the court also ruled that the admissions policies and practices employed by the University of Michigan failed to pass the narrowly tailored part of the test.

The Supreme Court said the 20 points assigned to all underrepresented minorities were sufficient to qualify virtually all minority students for admission. The court contrasted this to the Bakke case where Justice Powell envisioned a review process that would allow admissions counselors to examine the special characteristics and qualities of individual candidates. In the opinion of the court, the University of Michigan approach meant that such individual reviews, while permitted, were unnecessary.

Grutter v. Bollinger 539 U.S. 982, 123 S. Ct. 2325 (2003)

University of Michigan: Law School Admissions Policy

A summary of the significant finding of the case is:

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in Bakke, truly individualized consideration demands that race be used in a flexible, non-mechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. See id., at 315-316, 98 S.Ct. 2733. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Ibid. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. Ibid.

The University of Michigan law school developed an admissions policy that "seeks a mix of students with varying backgrounds and experiences who will respect and learn from each other."

Grutter v. Bollinger, 539 U.S. 982, 123 S. Ct. 2325 (2003) is one of two University of Michigan cases testing whether race-based admissions programs developed under a diversity approach to equal opportunities violate the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act.

The Grutter case is one of the first post-Bakke (Regents of the University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 1978) cases to directly test whether achieving a diverse student body is a compelling state interest sufficient to permit admissions decisions partially based on race. Correction of past discrimination is a commonly accepted example of a compelling state interest, but it had not been determined by the federal courts that achieving racial diversity also could represent a compelling state interest sufficient to allow the use of racial preferences. Justice Powell, in a plurality opinion in Bakke suggested that the use of racial preferences to diversify a student body could be appropriate, but because that portion of his opinion did not include a majority of the court, diversity has not been universally accepted as a reason to allow race-based preferences. Grutter, in fact, endorses the Justice Powell opinion in Bakke.

To comply with the strict scrutiny standard, there must be a showing that the interest, in this case racial diversity, is a compelling state interest. Merely stating that racial diversity is a good is not sufficient to justify the use of racial preferences; there must also be a showing of what diversity accomplishes. Further, the processes and policies used to accomplish the goal of racial diversity must be narrowly tailored to achieving that end, and there must be a showing that other, race-neutral means were attempted.

Previously, the fifth circuit and third circuit courts struck down race-based admissions and student financial aid policies based on race. But, the primary issue before those courts was not the stated desire of the institution to promote racial diversity. In Grutter and Gratz, racial diversity as a goal was front and center.

The U.S. Supreme Court ruled in Grutter that achieving diversity was a compelling state interest, that the use of race in making admissions decisions at the University of Michigan's College of Law was narrowly tailored, that the university had demonstrated that it tried other means to create a diverse student body, and that the admissions program met all of the tests set out in the Bakke case. The court ruled that the use race as a factor in the law school admissions process was permissible. Critical to the ruling are the facts that the minority law school students were considered as part of the overall group of candidates, and that the merits, talents and qualifications of each student were individually considered. In the Gratz case, the absence of the individual review was critical to an adverse finding by the court.

Grutter and Gratz

Taken together, these cases reaffirm the plurality language of Justice Powell in Bakke that race-based admissions policies may represent a compelling state interest, that achieving racial diversity at times may be sufficient to allow for such race-based preferences, but that the use of race-based criteria must be narrowly tailored and must allow for individual decisions based on the application of a number of criteria, where race is simply one factor among many.

Section IV. The Kentucky Desegregation Plan

Kentucky's Experience: Kentucky is a 2nd tier Adams State. By letter dated January 15, 1981, the Office for Civil Rights notified the Commonwealth of Kentucky that, in violation of Title VI of the Civil Rights Act of 1964, it had failed to eliminate the vestiges of its former de jure racially dual system of public higher education. Kentucky responded by developing a voluntary plan of compliance. The Governor, John Y. Brown, Jr., designated the Council on Higher Education as the state agency to develop, implement, and monitor a statewide higher education desegregation plan. The OCR accepted Kentucky's five-year voluntary plan in June 1983. The Kentucky Higher Education Desegregation Plan, as implemented by the Commonwealth at the direction of the Office for Civil Rights, set forth the Commonwealth's commitment to eliminate any vestiges of a segregated system. The Plan addressed three objectives, corresponding with the primary areas of concern raised by the OCR in all Adams states.

- Enhance the state's traditionally black institution, Kentucky State University.

- Improve African American student enrollment and retention at the state's public colleges and universities.
- Increase the number of African American faculty and staff at the seven traditionally white institutions.

Kentucky's 1982-87 Statewide Desegregation Plan: The 1982-1987 plan included general commitments, specific objectives for each institution and annual evaluations of institutional progress toward those objectives, and strategies for enhancement of Kentucky State University. Reports, plan changes, and evaluations were annually prepared for the OCR from 1983-87. A final report was submitted to the OCR in August 1987.

The council used an advisory committee to oversee its postsecondary education desegregation efforts. The Committee on Equal Opportunities (CEO) replaced the initial Desegregation Implementation Committee (1980-1989) in 1990. The CEO membership includes three members of CPE, one member of the General Assembly and broad statewide representation. Its oversight function is enhanced by a collaborative relationship with institutional representatives and the council, campus visits, and a new law that requires the council to postpone degree program approvals for institutions not making progress toward the objectives in the Plan. (In 1992, the legislature passed SB 398 (KRS 164.020 (18)) requiring the council to not approve degree program proposals for institutions not making progress toward the equal educational opportunity objectives in the equal educational opportunity plan. An administrative regulation sets forth the conditions under which a waiver may be granted.)

Implementation Actions: *Admission and Scholarship Policies, Program Duplication, Institution Mission, and Employment.* Beginning with the 1984-86 biennium, the Governor and the General Assembly provided state funds for implementation of desegregation plan activities. To provide for continued support of these activities, the Equal Educational Opportunities funding was made a component in the Kentucky Appropriation Recommendation Formula.

To further expand opportunities for institutions to identify and encourage students to seek admission and pursue a college degree, the Governors Minority Student College Preparation Program was funded by the 1986 General Assembly as a cooperative effort between the council, the seven traditionally white institutions, and Kentucky State University. The program acquaints minority middle school students with a college campus and the advantages of college attendance and graduation at a time when they still have the opportunity to prepare for college. One hundred percent of the funding for this program is allocated as grants to institutions, host an annual Proficient Seniors and Juniors conference, and an annual Governors Minority Student College Preparation Program conference. Eight institutions receive grants, from recurring funds, to establish Governors Minority Student College Preparation Programs. In 2000, grants totaling \$95,000, from non-recurring funds, were awarded to 13 additional institutions to establish Governors Minority Student College Preparation Programs.

Student Enrollment and Retention: Objectives were adopted to ensure that the proportion of Kentucky resident African American high school graduates throughout Kentucky who enter two-year and four-year undergraduate public institutions would remain at least equal to the proportion of white high school graduates throughout the state who enter such institutions. This

activity was tied to institutional achievement of affirmative action employment objectives related to faculty and staff.

Baccalaureate Degree Awarded/Graduation Rate: Similar objectives were developed to raise the proportion of Kentucky resident African Americans who receive undergraduate degrees and enter graduate or professional programs to equal the proportion of white Kentuckians who do so.

Employment and Appointments to Boards of Regents and Trustees: Objectives were adopted to desegregate employment at state-supported colleges and universities, the coordinating agency, and the higher education assistance authority. The Commonwealth committed to appoint African Americans to the coordinating board, the assistance authority, and all university governing boards. Also, the Commonwealth committed to ensure that Kentucky State University's Board of Regents is of the highest caliber.

Desegregation Plan Implementation Funds - Origin and Purpose: The desegregation plan implementation funds were requested by the council and authorized by the 1984 General Assembly.

- Purpose of the Funds: Funds were requested by the council to support institutional efforts to meet the commitments made in the 1982 Kentucky Higher Education Desegregation Plan. Specifically, the funds were appropriated to support enhancement of Kentucky State University, the historically black institution, and to desegregate student enrollments, and faculty and staff employment at the traditionally white institutions. The council and institutions recognized that specially funded programs were essential to achieve parity at each institution and within the system. The council's request recognized that funds generated by the funding formula did not address the commitments of the desegregation plan.
- Enhancement of KSU: Funding was authorized to support desegregation plan commitments to enhance and strengthen academic programs, faculty development, university scholarships to support the liberal studies program, faculty exchange and seminars, student advising and counseling, and student services.
- Traditionally white institutions: Funding was authorized to support student and staff desegregation activities at the traditionally white institutions. And to support efforts by University of Kentucky, University of Louisville and Northern Kentucky University to assist in the enhancement of KSU – establishment of a graduate education center. Also, the funds were intended to support the following general areas as identified in the desegregation plan student recruitment, student retention, financial aid, and faculty and staff recruitment and retention.

Some specific initiatives to support recruitment of undergraduate minority students included visits to middle and high schools, and community colleges, special visits to predominately black high schools, peer recruitment activities, support for minority student organizations and activities, university departmental orientation programs, community based liaisons and activities, summer minority fellowship programs for juniors and seniors to work with faculty, development of handbooks, survival kits, brochures, career/college fairs, coordinator for

minority student recruitment, minority admissions counselor, minority awareness committee, and marketing and advertising campaigns.

The rationale and purpose for supporting the recruitment and retention of undergraduate students also applied to supporting recruitment of students to enroll in graduate and professional programs. In conjunction with the recruitment activities funds were also sought to develop effective programs to retain the students until they graduated. Examples of programs supported are minority student affairs, pre-service training workshops for residence hall counselors, recruitment of African American residence hall counselors, systems to track the progress of minority students and target services for students experiencing difficulty, and student learning and development centers.

The funds were also intended to address special problems of advertising associated with recruiting minority faculty and staff, developing special seminars to encourage in formation and cultural exchange, participation on graduate student recruitment programs, establishing visiting professorships, sponsoring conferences of special interest, establishing regular contact with minority organizations, advertising with minority organizations and publications, sponsoring summer programs, continuing education courses and counseling, special training programs for staff, developing temporary employment labor pools to retain qualified employees, and assisting current employees to further their education.

The authorization of desegregation funds by the General Assembly recognized the commitment of the white institutions to improving other race student recruitment and retention patterns. In support of that effort funds for financial aid of other race resident students was included.

Enhancement of Kentucky State University: The Kentucky State University mission was revised to make the university the Commonwealth's public small, liberal studies university – unlike any other public institution in Kentucky. The redefined mission called for KSU to deliver a liberal studies curriculum, meet the educational needs of community students, and serve the educational needs of state government employees.

KSU Mission: Adopted in 1982. The state's unique, small, liberal studies institution with the lowest student-faculty ratio in the state system. The university shall serve as a residential institution with a range of traditional collegiate programs appropriate to its unique role. *This mission was revised November 3, 2003 and will be reviewed again in 2005.*

Geographic Region: The geographic region shall be statewide for its liberal studies mission, its land grant functions, and its service to state government. In addition, KSU's primary service area for commuting students shall be for Franklin and contiguous counties.

- The Governor provided new funds in KSU's 1982-84 budget to initiate enhancement activities.

- The university was expected to excel as the small liberal studies institution with the lowest undergraduate faculty-student ratio among the state's public institutions. The Kentucky funding formula, by the use of special equations, assured KSU a 25 percent advantage in undergraduate faculty-student ratio compared to the next lowest faculty-student ratio among the Kentucky public universities.
- Beginning in 1983, the University of Kentucky and the University of Louisville implemented cooperative programs through which KSU graduates achieving a specified grade point average in a curriculum approved by the three cooperating institutions will be offered admission to the medical school (up to 3 percent of the entering class), and dental school (up to 3 percent of the entering class). Northern Kentucky University, the University of Kentucky, and the University of Louisville implemented cooperative programs through which KSU graduates achieving a specified grade point average in a curriculum approved by the four cooperating institutions will be offered admission to the law school (up to 3 percent of the entering class).
- The Council on Higher Education implemented a program to provide for the recommendation for admission annually of at least one qualified Kentucky resident KSU graduate to veterinary medicine school under the contract space program administered by the council. The council administers a contract space program that pays the difference between in-state and out-of-state tuition each year for each contract student.
- The Secretary of the Finance and Administration Cabinet directed, in 1983, that the use of state training funds and tuition assistance is not to be approved for non-KSU programs – where such a program is offered and available at KSU except where otherwise restricted by pre-existing contractual obligation or where geographically inappropriate. Also, the Secretary of Finance and Administration established the State Governmental Services Center at KSU to provide a vehicle through which state employees may be trained. The Governmental Services Center is now administered by the state Personnel Cabinet.
- In 1982, a comprehensive land-grant activity plan was completed by KSU. Beginning with the 1984-86 biennium, the Governor included requisite matching funds consistent with USDA appropriations in his biennial budget to assist in continuing development of existing or new land grant functions at KSU.
- In 1982, a facilities condition audit was completed at KSU to determine areas of priority need and potential cost savings. Based on the results of the facilities audit, the council and the Governor began recommending capital improvements required to achieve the program mission of KSU as provided under the desegregation plan. Upgrading the physical facilities is one of the most visible indications of the enhancement of KSU.
- All actions taken by the Commonwealth to provide additional funds to enhance Kentucky State University are continued under the existing funding model.